Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota *and* Local No. 687, Allied Industrial Workers, AFL-CIO. Cases 18-CA-6328 and 18-CA-6380

March 8, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 12, 1981, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the following for paragraph 2(c):

"(c) Make the striking employees whole for any loss of earnings they may have suffered by reason of the discrimination against them by paying them backpay from and after the date 5 days after the date when they unconditionally offered to return to work, computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[3,2]"

3. Substitute the attached notice for that of the Administrative Law Judge.

[4] Member Jenkins would calculate interest on backpay due in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice

[1] Fn. 22 of the Administrative Law Judge's Decision refers to the date of a letter outlining Respondent's contract proposals as being March 29, 1980. The correct date of the letter is October 29, 1979; we hereby correct this inadvertent error.

In the absence of exceptions thereto, we hereby adopt, *pro forma*, the Administrative Law Judge's finding that Respondent was not responsible for the delay in the commencement of bargaining negotiations.

Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent has excepted to the Administrative Law Judge's conclusion that the strike herein, which began on July 25, 1979, was at its inception, and continued to be throughout its duration, an unfair labor practice strike. The record herein clearly establishes that the factors motivating the employees to strike included Respondent's unlawful efforts to bypass the Union and bargain individually with its employees as well as Respondent's unlawful diatribes against Stan Frank, the Union, and organized labor in general. Moreover, it is clear that Respondent's unlawful bargaining tactics significantly prolonged the strike. Accordingly, we find no merit in Respondent's exception.

[3] In his recommended Order, the Administrative Law Judge inadvertently failed to include the Board's standard injunctive remedy for Respondent's unfair labor practices. We hereby correct this inadvertent error.

As a procedural matter, Respondent argues that the Board is without power to order the reinstatement of those of its employees who engaged in the unfair labor practice strike which began July 25, 1979, because the General Counsel did not allege that Respondent had failed to reinstate the striking employees and the matter was not raised at the hearing herein. Inasmuch as reinstatement of unfair labor practice strikers is a remedial matter which need be neither pled nor litigated, we find no merit in Respondent's argument; however, we hereby modify the Administrative Law Judge's recommended Order to provide for the Board's standard 5-day "grace period" following the striking employees' unconditional offers to return to work before commencing Respondent's backpay obligation. See *Drug Package Company, Inc.*, 228 NLRB 108 (1977). In this regard, Members Fanning and Jenkins adhere to the views expressed in their partial dissent in *Drug Package, supra*; however, in the interest of administrative efficiency, they are willing to follow the holding in that matter as existing Board law.

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT bargain individually with our employees.

WE WILL NOT demean and insult Local No. 687, Allied Industrial Workers, AFL-CIO, or its representatives.

WE WILL NOT attempt to persuade our employees to abandon the Union.

WE WILL NOT refuse to bargain in good faith with the Union. The bargaining unit is:

All service and body shop employees employed by us at our Sioux Falls, South Dakota facility; excluding office workers, shop superintendents, executive or supervisory managers, parts department employees, janitors, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the free choice of the rights set forth in this notice.

WE WILL bargain in good faith with the Union as the collective-bargaining representative of our employees.

WE WILL offer all of the employees who began a strike on July 25, 1979, immediate and full reinstatement to their former jobs with us or, if such jobs no longer exist, to substantially equivalent jobs, without loss of seniority or other rights, privileges, or benefits, and WE WILL make each of them whole, with interest, for all money each of them lost from and after the date 5 days after their unconditional offers to return to work.

BILLION MOTORS, INC., D/B/A BILLION OLDSMOBILE-TOYOTA

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: On July 12, 1979,[1] Local No. 687, Allied Industrial Workers, AFL-CIO, herein referred to as the Union, filed the charge in Case 18-CA-6328 alleging that Billion Oldsmobile-Toyota (Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota), herein referred to as the Company or Respondent,[2] had bargained directly with its employees, had consistently refused to meet with the designated bargaining representative of its employees, and had unilaterally failed to honor the checkoff provisions in its collective-bargaining agreement with the Union, all in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.*, herein referred to as the Act. On August 20 the Regional Director for Region 18 of the National Labor Relations Board, herein referred to as the Board, approved a previously executed settlement by the terms of which the Respondent, without admitting that it had violated the law, undertook certain actions with respect to its employees and the Union.

Subsequently, on August 24, the Union filed an additional charge in Case 18-CA-6380 alleging further and additional violations of Section 8(a)(1) and (5) of the Act. An investigation of these charges was made and, in consideration of the evidence adduced in that investigation, the said Regional Director determined that the undertakings set out in the settlement agreement of August 20 had been breached, and he withdrew and revoked his approval of said agreement, ordering that it be vacated and set aside under date of October 17.

On the same day the said Regional Director issued an order consolidating Cases 18-CA-6328 and 18-CA-6380, a consolidated complaint and notice of hearing. On October 25 Respondent filed an answer denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me in Sioux Falls, South Dakota, on March 18, 19, and 20 and May 13, 1980, at which all parties were represented by counsel and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing counsel for Respondent and the General Counsel submitted briefs, which have been carefully considered.

Upon the entire record of this case, including particularly my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent is a South Dakota corporation having its office and place of business in the city of Sioux Falls where it is engaged in the retail sale and service of new and used automobiles. Respondent annually derives in the course and conduct of its business gross revenues in excess of $500,000, and annually purchases and receives goods and materials valued at over $50,000 directly from points outside the State of South Dakota. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local 687, Allied Industrial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein are in 1979 unless otherwise specified.

[2] Mr. Berens withdrew his appearance as counsel for Respondent before being sworn as a witness in this proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company and the Union had had a collective-bargaining relationship extending back to 1970. During this time, although the evidence indicates that there was a strike in 1970, the parties enjoyed good relations. They had evolved an annual negotiating procedure which, although casual and informal, apparently suited them. Each year when the contract expired, employees would meet and formulate proposals for the forthcoming negotiations. These would then be given to the Union's business agent, Stan Frank,[3] who would have them typed and sent to the Company. Sometime later, the evidence on this point indicated that it would be 2 or 3 days up to a month, members of the Union's negotiating committee would approach the Company through David Billion, the Company's president since 1973, and request a meeting. David Billion would then meet with the negotiating committee, composed of representatives of commission mechanics, hourly paid mechanics, and body shop employees, together with Frank, at the Sioux Falls Labor Temple, and negotiate the new contract.

Under this practice negotiations would sometimes move slowly, and there is evidence that no agreement was reached until August or September, but eventually each year agreement was reached. The parties agreed, in any event, that each new contract would be effective when agreed upon, and there were no provisions for retroactivity. Apparently May 15 was the expiration date, whenever the contract was signed.

In the summer of 1978 the Union organized a unit of employees at Billion Chrysler-Plymouth-Datsun,[4] was recognized by management, and commenced negotiations. There were problems with these negotiations and on October 5, 1978, the Union filed a charge against the Company in Case 18-CA-6003. The charge was dismissed by the Regional Director for Region 18 on November 30, 1978, and the record here does not show whether an appeal of this dismissal was ever filed. The record does show that whether as the result of the difficulties in negotiations, or the charge filed by the Union, the Chrysler-Plymouth-Datsun dealership was, by November 30, 1978, represented by Attorney Kelvin C. Berens.

These problems at the other dealership were upsetting to Stan Frank, who, sometime in February 1979, posted a notice in the Sioux Falls Labor Temple urging people not to do business with the Billions at their Chrysler-Plymouth-Datsun location. In turn, as will be detailed later, David Billion, and to a lesser extent his father, Henry, were furious at what they considered "false charges," and the expense the charges had cost them, and at the boycott notice.[5]

B. *The Beginning of Negotiations*

This, then, was the situation on May 15, 1979, when the collective-bargaining agreement expired at Billion Oldsmobile-Toyota.

On May 4 the employees gathered in the Company's body shop after hours and drew up a list of 13 proposals for the coming contract year. These were transmitted to Stan Frank who had them typed and then, about May 19, sent to David Billion.

By June 1 the Union's negotiating committee (which was composed of Gerald Buskohl, the shop steward, Doug Wenzel, representing the commission mechanics, Steve Frager, representing the hourly paid employees, and Randy Risch, representing the body shop) became concerned because they had not heard from David Billion. Accordingly, it was decided that they would go in to see him.

On June 5 Buskohl was on vacation, but the other three, Wenzel, Frager, and Risch went to see David Billion. According to Frager, the only employee who testified about this meeting, Billion said he would not negotiate with them because of Stan Frank, and he did not want anything to do with organized labor because he went through an ordeal at the other dealership with Stan and it had cost him a lot of money. Therefore, he did not want anything more to do with Stan. Billion was asked if they could have another union representative come in to replace Frank. Billion replied that no matter who they brought in it would be the same. It did not matter who was there, if organized labor was present, he would not be. Billion added that he thought they could settle things among themselves and that they did not need outside involvement. He stated that he had nothing against them but he would have nothing to do with Stan Frank.

Billion then added that if they went out on strike it would have a "totally different outcome," apparently in reference to a previous strike in 1970.

David Billion's version of this incident was quite different. He recalled the visit, but he stated that he told the employees on June 5 that, because Stan Frank had hired outside counsel, and he, David Billion, was an "amateur," he did not think he should be involved in matters that would be over his head. He felt he was dealing with professionals and he should have professionals dealing for him.

I did not find David Billion to be a credible witness. In this instance, after relating these reasons which he gave to these employees on June 5, he went on to describe a meeting on June 6 with the same employees and Buskohl in entirely different terms, indeed, terms consistent more with Frager's account of the June 5 meeting than Billion's own. Further, David Billion exhibited a poor memory, admittedly confusing one meeting with others, and his general denials of events and words alleg-

[3] Local No. 687 is an amalgamated local, representing employees at several locations including an International Harvester plant in Sioux Falls. Frank did not work for Respondent, but did at times work for other employers and at other times worked full time as a business agent.

[4] The precise relationship of this dealership to the Oldsmobile-Toyota dealership was not made clear on the record. It is owned by the Billion family with day-to-day management in the hands of Henry Billion, David's father, but in view of David's reaction to events there, he undoubtedly has considerable interest in the Chrysler agency, which is referred to the record as the "other place" or "other dealership."

[5] David Billion also testified that he was angry at Stan Frank because of some "political" thing they were both involved in but this point was not elaborated. I do not think this actually had much to do with the events of this case.

edly used by him carried no great weight with me because they were in many instances elicited by leading questions or suggestions. Thus, I do not credit much of Billion's testimony on material issues in this case, recognizing that it may well be that his poor memory, rather than a conscious attempt to deceive, is to blame.

Frager, on the other hand, I found to be a candid and credible witness. I credit his version of the June 5 meeting as outlined above despite the lack of corroboration.

After the meeting was over Frager did not know what to do, so he called Buskohl, the shop steward. Buskohl arranged a meeting of the committee the next morning at the Labor Temple, and it was decided that Buskohl would accompany the committee back to David Billion's office. Both Buskohl and Frager testified about this meeting, and their stories basically agree.[6] The meeting opened with Buskohl asking if Billion was ready to negotiate. He replied that he was not negotiating this year, and that he had hired an attorney. Buskohl asked why and Billion said he would not sit down at a bargaining table with Frank because Stan Frank is a "no-good SOB" and Billion did not trust him. Further, Frank was out to get Billion for what happened at the other facility. Buskohl persisted, saying that they had to sit down and get a negotiations date. Billion then said that he did not know why the employees had to pay union dues, that they could draw up a company handbook and it would be just as binding as a union contract. Billion then talked about how Stan Frank had cost him $8,000 at the other facility and repeated that Stan was out to get him. Undaunted, Buskohl again asked about a date. Billion said that Frank knew who his lawyer was and that Frank should contact him. Buskohl then asked for the lawyer's address and telephone number. Billion wrote it out and gave it to Buskohl and the meeting concluded with Billion telling the employees that they had to make up their minds who they were working for, Billion or Stan Frank, and that they had to account to him and not to Stan Frank.

David Billion's version of this meeting agrees with that of Buskohl and Frager insofar as Billion admitted that he was not going to negotiate with Stan Frank, and he had retained Berens as his attorney for that purpose. However, in response to what I regard as suggestions from his counsel, he denied that he referred to Frank as an SOB; that he offered to implement an employee handbook; that the employees would be better off without Stan Frank; or that it would be in the interest of everyone if there were no union at the Oldsmobile-Toyota dealership. I do not credit these denials and I find that the conversation occurred as related by Buskohl and Frager.

After the meeting Buskohl relayed Berens' address and telephone number to Frank. The latter, however, made no attempt to contact Berens. Frank's theory, as expressed to David Billion, and in his testimony at the hearing, was that he had fulfilled his obligation to the negotiation process by transcribing and forwarding the employees' proposals to David Billion, and that he had no further obligation to seek out Billion's lawyer. On the contrary, Frank's view was that Berens knew him, knew his address, and that Berens should contact him to commence negotiations.

Despite the urgency shown by the employees' two meetings with David Billion, neither Frank, for the reason noted above, nor Billion made any attempt to contact Berens during the month of June. Then, on June 27, the employee negotiating committee met with Frank and decided that they would all go and confront David Billion again. They went to Billion's office, "barging in" in Billion's words, and Frank asked Billion if he was prepared to negotiate. Billion again stated that he was not going to negotiate that year. He told Frank that Frank had the Company attorney's number and that Frank could contact Berens if he wanted to set a date for negotiations. Frank replied that Billion had hired the attorney, Frank had sent Billion the proposal, and that it was up to Billion to have the attorney contact Frank. Billion replied that he did not like Frank, or trust him, that he had been totally unfair with him at the "other place," the Chrysler-Plymouth-Datsun dealership, and that he would never sit across the bargaining table with Frank. Billion and Frank continued to argue about the other dealership and the meeting broke up.

Again, no action was taken by either Billion or Frank to communicate with Berens to initiate the negotiations.

On July 3, Buskohl testified that David approached him and said that the Company was thinking about giving a raise to the hourly paid employees because it looked like the negotiations would be dragged out for a long time. Buskohl suggested that the thing to do was to sit down with the committee and discuss it. Billion replied that in no way was this negotiating and what he was saying was not negotiations. He then said that he would go to his office and decide how much the employees were entitled to receive.[7]

Later that day David Billion called Frager into his office. Billion began by saying that it was time the hourly paid employees "deserved" a raise. Billion stated that by no means was he bargaining individually, and wages would be discussed at the bargaining table, but he thought negotiations would be long and drawnout. They deserved a raise, and if it was all right with Stan Frank Frager would get a 60-cent increase. Billion added that if Frank really cared about Frager he would not object to this raise, but if Frank did object it would show what he cared about them. If they did not get the raise in those circumstances it would be the fault of the Union because the Union had the final say over whether they got the raise or not. Billion then went on to mention that Mike Wenzel's "labor," a reference to productivity, was not as high as Frager's and that was one "kind of tough thing about the contract" that if Frager turned out more labor it would be easier to give him a little higher rate than some one who did not turn out as much labor. David Billion did not testify about this meeting and since I found Frager to be a credible witness I find that the conversation took place as recorded above.

[6] Frager was, of course, in error when he said that "Stan" was at this meeting, but I will not discredit his testimony on that account.

[7] The hourly paid employees were Mike Wenzel and Frager. Billion's version of this meeting is substantially the same as Buskohl's.

On July 13 David Billion called Mike Wenzel into his office, telling him that he wanted to talk not as contract negotiations or a contract offer, and that Wenzel was free to get up and walk out at any time. Having said this, Billion then told Wenzel that he was having a hard time getting hold of Frank to set up contract negotiations, that Frank was not answering Billion's letters because Frank had a personal grudge against him. Billion went on to say that he did not think contract negotiations would be over for a long time. He said that he did not think Stan Frank really cared about the employees; that all he wanted to do was to "go back to court" with Billion because Billion got out of the charges against him at the other dealership. He then described the charges as false, called Stan Frank a SOB, and said that they could get along better without Frank if David Billion could just talk to the "guys in the shop," but that was their decision to make. After all of this Billion got out Wenzel's labor sheets. He again stated that negotiations were going to take a long time, and told Wenzel that he would like to give him a raise now. The raise would be 60 cents, from $4.40 per hour to $5. Billion then told Wenzel that he was sending a letter to Stan Frank about the raise, and if it was not acceptable to the Union he would cancel the raise. Wenzel then read the letter, and the meeting ended.

David Billion testified about this meeting but omitted to mention anything but the beginning and the end, eliminating any references to long, drawn out negotiations, or diatribes against Stan Frank. I credit Wenzel's version of the meeting since I found him to be candid and credible.

David Billion also testified that on July 12 he had called Stan Frank and informed him of what he intended to do about the raises. Frank replied that he should put it in writing. This, according to David Billion, was the reason he composed the letter he showed to Wenzel. The letter was mailed on July 13 and on July 14 David Billion left for a vacation in Minnesota, leaving his father, Henry Billion, in charge of things at the Oldsmobile-Toyota dealership.

In the meantime, the employees had met at the Labor Temple on July 11. They had been informed of the wage offers which had been or were to be made to the hourly paid employees and they agreed that the offer would be rejected.[8] Thus, when David Billion's letter of July 13 was received, it was answered by Stan Frank on July 16 with a refusal to accept the increases.

To conclude this episode, Henry Billion called Frager and Wenzel into David's office and showed them the July 16 letter from Frank. According to Wenzel, Henry Billion asked them if they had any part in turning down the raise. They said they had and that everyone agreed that this should be done through the bargaining committee. Henry said that he was sorry it happened, although he was not really aware of the situation. He said he was trying to get hold of Berens, and also trying to get hold of David, but then went on to describe Stan Frank as a SOB and to say that he did not like Stan Frank. According to Frager, Henry added that he did not hold any grudges against Frank. Henry again repeated that he was sorry, and this meeting ended. Henry Billion did not testify as to this meeting, and I base my findings on the credible testimnny of Frager and Wenzel.

Also on July 17 Henry Billion came up to Buskohl and asked him to speak to David, who was calling from Minnesota. David asked Buskohl what was going on. Buskohl replied that nothing was going on, and they just wanted to get negotiations started or get a date. David said that his attorney was trying to get hold of Stan Frank and could not do so. Buskohl, always alert, suggested that the attorney could get in touch with him. David then asked if the employees were going to strike. Buskohl reassured him that there was no talk about a strike but they had to have a negotiation date. David then said, "Well, I can see it now, Stan has already filed charges with the NLRB, and there goes another $5,000 down the drain.[9] Stan is out to get me." Buskohl again reassured David that no one was out to get him, but persisted in saying that all they wanted was a negotiation date. David concluded by asking Buskohl not to strike, to give him a few days, and promising to get back to him.

David Billion testified only in general terms about this conversation, and did not deny the substance of the conversation as reported by Buskohl. Buskohl was a completely credible witness. His memory was excellent and, since he was on the witness stand for an entire day, he was called upon to recall, and did recall, the entire history of this case. Two minor slip-ups noted by Respondent in its brief are not sufficient, given the volume and complexity of Buskohl's testimony, to impair his credibility. I thus find that the conversation occurred as described by Buskohl.

After this Buskohl asked Henry Billion to set up a meeting, but Henry declined. Buskohl called Frank, who suggested that Buskohl ask Henry to meet the negotiating committee at the Labor Temple on the next morning, July 18. Henry again refused, but said that he would meet with anyone who wanted to talk to him in his office the next morning.

On July 18 all of Respondent's employees met at the Labor Temple at 7:30 a.m. and voted, unanimously, to strike if they did not get an answer on setting up a negotiating session. In addition Buskohl testified, and I find, that the individual bargaining by David Billion with Wenzel and Frager was discussed and formed an additional reason for the strike vote.

After taking the strike vote, the employees went to the Oldsmobile-Toyota dealership. The bargaining committee and Stan Frank went in to talk to Henry Billion and the other employees remained on the sidewalk in front of the premises. Henry explained to them that he had put in a call to Berens and would get back to them with a definite date as soon as he heard from Berens. Apparently satisfied with these assurances, the committee left the office and all of the employees went to work.

[8] On July 12, the charge in Case 18-CA-6328 was filed by the Union's counsel.

[9] Somewhat of an underestimate, I would guess, in view of subsequent developments.

Up to this point it is undisputed that Stan Frank, acting in accordance with past practice and his personal view of the relative responsibility of the parties here, had refused to contact Company Attorney Berens. On July 18, Henry Billion apparently spoke on the telephone to Berens. The latter responded by sending a mailgram to Frank. This mailgram was introduced into evidence and it is a significant document. The mailgram states that Berens had "attempted to contact [Frank] since early June." There is no other evidence in the record that Berens had made any effort to contact Frank before the transmittal of this mailgram. Indeed, Berens himself testified at the hearing that the first contact he had with Frank was the July 19 mailgram. Berens sent the mailgram as a result of a conversation he had the day before with Henry Billion, who had asked Berens to try to contact Frank. Thus, I find that Berens was not truthful either in the mailgram to Stan Frank, or in his testimony in this proceeding. In either case I am left with serious doubts about Berens' credibility.

The mailgram also indicates that Berens was aware of the individual bargaining, and of the unfair labor practice charge in Case 18-CA-6328 which had been filed on July 12. Further, comments by Berens in the mailgram about a strike and the replacement of economic strikers indicate that word of the July 18 strike vote had filtered back to management and thence to Berens. These statements make it clear that Berens had talked to someone from management, probably Henry Billion, but there is no indication from this that any more substantial matters, such as the bargaining position to be taken by the Company, were discussed. The mailgram concluded by advising Frank that Berens would not be available the next week.

On receiving the mailgram Stan Frank replied not by telephone, or mailgram, but by a letter in which he demanded that negotiations begin no later than July 25. Frank suggested no dates for a meeting and did not mention the fact that a strike vote had been taken or, significantly, that a strike would take place if the July 25 deadline was not met.[10] He did, however, state that he had mentioned Berens' July 19 mailgram to the negotiating committee. This statement, while repeated in Frank's testimony, was not corroborated, and was in fact denied by the employee witnesses who testified. For this reason, as well as others discussed below, I have serious doubts as to Frank's credibility on critical issues.

On July 21, Berens sent Frank another mailgram. He obviously had not received Frank's July 20 letter, but had been in communication with someone from the Federal Mediation and Conciliation Service. Berens again raised the prospect of a strike, and permanent replacement of the employees, pointing out the risk of a strike in these circumstances. He concluded by again urging Frank to contact him and set up negotiations.

Frank made no reply to this second mailgram. Then, on July 25, the employees returned once more to the Labor Temple to consider their situation. Frager testified that they wanted to assure themselves that they had to strike as a last resort. Buskohl stated that all agreed that they had given Berens enough time to contact Henry Billion to set up a date.[11] So they proceeded to set up picket schedules and proceeded to Respondent's premises where they began the strike and set up picket lines.

After the picket lines had been established Henry Billion came out and told Buskohl and the others that he was trying to contact Berens. Henry asked if they were going to stay on the picket line. They assured him that they were until they had a date for a meeting. On the morning of the next day, July 26, Henry Billion again came out to the picket line and told the striking employees that Berens was coming into town that morning to meet with the Union. The meeting was set up for 9:30 a.m. at the Howard Johnson motel in Sioux Falls.

C. *The Negotiations*

Including the first meeting on July 26, 1979, and the last, on March 13, 1980, the parties held a total of nine bargaining sessions. Meetings took place on July 26, August 1, 7, and 20, September 6, 14, and 28, October 19, 1979, and March 13, 1980.[12] Stan Frank acted as the Union's chief spokesman, assisted by the employee bargaining committee, Buskohl, Frager, Risch and Wenzel. On one occasion Attorney Harry H. Smith attended a meeting, but there is no record of what contribution he made and, at the October 19 meeting, a Federal mediator was present. Berens was the sole representative of the Company at all but one of the meetings, where his associate Terry Schraeder sat in for him.

Evidence on the content of the meetings was presented by the General Counsel in the form of extended testimony from Buskohl and Frank. The Respondent called Berens[13] as a witness. However, Berens did not testify as to the substance of what went on at the meetings, but identified a series of documents, written in longhand, as notes which he had made[14] during the bargaining sessions. Respondent then offered these notes as substantive evidence in lieu of direct testimony on the matters covered by Berens himself. The General Counsel objected to the admission of these notes, but I admitted them on the grounds that they constituted business records regularly kept by Berens. I reaffirm that ruling now. *Allis-*

[10] In view of the events of July 17, 18, and 19, outlined above, I think it is reasonable to infer that the Union had decided to implement the no-strike vote on July 25 if there was no action on its demand for meeting dates.

[11] Crediting the testimony of Buskohl and Frager, and discrediting that of Frank. I find that Frank had not told the employees of the two mailgrams he had received from Berens on July 19 and 21.

[12] There was an additional meeting on April 22, 1980, at which the parties discussed the signing of a contract. That meeting is not really material to the issues here.

[13] The General Counsel objected to the appearance of Berens as a witness in the light of my prior ruling excluding witnesses from the hearing room. There is authority for the proposition that the rule may be inapplicable to an attorney for a party, even though that party may be represented by other counsel, *Hughes* v. *State*, 126 Tenn. 40, 148 S.W. 543. Further, the right of a party to counsel of its choice cannot lightly be set aside, *Powell* v. *Alabama*, 287 U.S. 45 (1932). To have excluded Berens, even though he stated at the beginning of the hearing that he would probably be a witness, would, in my opinion, have seriously prejudiced Respondent in the presentation of its case. See, generally, 2d Am. Jur., Trials §52, §62.

[14] In one instance Berens' partner, Schraeder, had sat in and made the notes.

Chalmers Manufacturing Company, 179 NLRB 1 (1967).[15]

In determining what occurred at the bargaining sessions, I have relied primarily on the testimony of Gerald Buskohl. As noted above I found Buskohl to be a thoroughly credible witness, with remarkable powers of recall. His descriptions of the many sessions he attended were logical and in accordance with the inherent probabilities of the situation. Frank, on the other hand, showed a poor memory and an obstinacy which manifested itself in a number of situations where he almost refused to answer the questions put to him. I found him an unreliable witness, not for lack of candor, but through his poor memory and his stubborn insistence in answering the question he chose to answer, not the one which was asked.

With regard to Berens, I have already noted the discrepancy between his July 19 mailgram and his testimony at the hearing. In addition, Berens did not impress me as a witness. I found his answers shifting and evasive on the matters of whether his notes reflected that he had made some offers on July 26, and, particularly, his professed surprise that the union committee did not want to discuss the August 7 wage offer. Berens' demeanor likewise did not impress me. For these reasons I do not credit Berens in substantive areas, where his testimony differs from that of Buskohl. I find Berens' notes subject to the same qualification and I do not credit those notes where their substance differs from Buskohl's testimony.

I do not think I digress too much if I take some time at this point to discuss Berens' style of negotiations. There is only one mention of this in the complaint, but it is apparent from the amount of testimony that Berens' style and mannerisms did have an impact on the union committee. Buskohl testified that Berens' usual practice, or style, involved a late arrival, slamming his briefcase down on the table, then opening it and spending the next few minutes glancing through airline schedules. Buskohl also noted Berens' habit of taking laborious and copious notes during negotiations, halting all discussion until he was finished, sitting and staring silently for long periods, advising the employees to continue their strike, cautioning them about sunburn, and, at the conclusion of several sessions, telling the employees to "have a good day."

In any profession which demands skills in communication practitioners tend to develop a style or manner in approaching their tasks. It is apparent from Buskohl's impressions of Berens that the latter, in his brief time as a labor negotiator, has developed such a style. However, there is no evidence that these affectations intruded themselves into the process to the point where form affected substance. I cannot find that this aspect of the negotiations, which certainly impressed, if it did not annoy, the union negotiators, had any real influence on the substantive course of negotiations.

The complaint does allege that Berens failed to attend a scheduled meeting session on August 14. Both Buskohl and Frank testified that Berens had in fact missed that scheduled meeting.[16] Berens did not testify on the issue, but the parties did place in evidence a mailgram from Berens to Frank dated August 15 in which Berens stated that he had attempted to reach Frank by telephone on August 14 "for the purpose of setting up negotiations," and requesting a call. Berens' notes are not helpful since there is no mention in the notes for August 7 of a future meeting. Frank testified that there was a meeting scheduled for August 14, and that he went out to the Howard Johnson motel that evening to attend, but Berens did not appear. I do not rely on Frank's testimony because of his poor memory, but Buskohl also testified that there was a meeting scheduled for August 14. Thus, relying on Buskohl, I find that there was a meeting set for that day. However, it also appears that it was Berens' practice, along with the other mannerisms noted above, to set tentative meeting dates, and then confirm those dates later. This would give Berens more freedom to maintain his extensive and geographically wide-ranging practice. Buskohl admitted that he knew about this practice. If in fact the practice was followed in this instance, Berens should have communicated with Frank no later than August 14 in order to cancel the tentative meeting for that evening. The mailgram of August 15 says that Berens did just that. This, then, presents the question of whether I believe that the August 15 mailgram accurately describes what happened on August 14. I have already found that Berens' mailgram of July 19 contained statements which were not true. Similarly, in this situation, I find that Berens had not tried six times to locate Frank on August 14, and I find that Berens missed the meeting, although I cannot say whether this was intentional or merely an error.

Turning now to the actual negotiations, I do not feel that it is necessary to describe in detail all of the bargaining sessions. It is true that there were 13 items in the Union's bargaining agenda, and that both sides bargained hard on many of those issues. In the end, though, there was really only one issue which kept the parties apart for so long, and which furnishes the basis for the allegations in the complaint that the Company bargained in bad faith. That issue is the method for computing the employees' wages.

In order to understand this issue it is necessary to examine the situation as it existed before negotiations began. Respondent's operation is the only unionized shop in Sioux Falls, indeed, in the whole State of South Dakota. Over the years, presumably through negotiations, Respondent paid its mechanics and bodymen on a commission basis;[17] that is, the employees would receive a percentage of the labor costs charged to customers. With some variations not material here, the commission rate under the contract which expired on May 15 was 47.5 percent. This figure was converted to dollars by using two factors. The first was the shop rate, the

[15] In so ruling I note that the notes were in the General Counsel's possession from at least the beginning of the hearing in March until Berens testified on May 13, 1980.

[16] They also testified that Berens missed a scheduled meeting on August 6, but there is no allegation in the complaint concerning that meeting. The evidence on this is so imprecise that I can make no finding on the August 6 incident.

[17] There was also an issue over wages for hourly paid employees but in my view this would have settled without serious problems if it were not for the issue of wages for employees on commission.

amount charged to customers, which up to the time of the strike was $18 per hour. The second factor was the computation of the time necessary to do a given job. This computation was based on rates set out in various service manuals. Work done on new cars during the period they were under manufacturer's warranty was computed in conformity to schedules contained in a book published by the manufacturer, referred to as the factory book. Since the cost of some of the work done by the factory book had to be absorbed by the manufacturer under the terms of the warranty, and because the cars were new, the rates were relatively low. The rates for cars other than Oldsmobile and Toyotas, and for those Oldsmobiles and Toyotas which were older and no longer subject to warranties, were computed on the basis of other books, including one published by someone named Mitchell. The rates in these were somewhat higher than those in the factory book.

The advantage to both the Company and the employees under this system was that it rewarded enterprise by placing a premium on fast, efficient work. The books placed a time value on any job to be done. If the employee could do the job in less time, he and the Company would share in the excess profit resulting from the performance in less than the time estimated in the book.

The Union proposed in the 1979 negotiations to raise the percentage paid to mechanics and body men from the existing 47.5 percent to 50 percent. On July 26 Berens arrived about 30 minutes late for his appointment with Frank and the employee bargaining committee at the Howard Johnson motel. As described by Buskohl, he slammed his briefcase down on the table, opened it and spent some time looking at an airline schedule. Berens then asked Frank for copies of the expired contract and the new proposals. Frank supplied them and Berens looked them over.

According to the testimony of Buskohl and Frank, Berens then proceeded to go down through the list of 13 proposals, finally adding a 14th of his own, that the contract be for a term of 3 years. With regard to the first two items, wherein the Union had asked for an increase in commission rates from 47.5 percent to 50 percent for mechanics and bodymen, Berens stated that the Company would pay 48 percent. In his own testimony, Berens specifically denied that he made such a proposal. He stated that he made no proposal on wages on July 26, advising the employees that he had to discuss these issues with David Billion before coming in with a proposal. Berens' notes of the July 26 meeting corroborate this.

In resolving this direct conflict I have considered the following factors: First, it is unlikely that the upcoming negotiations were discussed by Berens and David Billion. Both testified that they had discussed wages before July 26, but both were so vague and imprecise about what was discussed, or when or how, that I do not believe them. There is no evidence that Berens was in Sioux Falls at any time in the spring and summer of 1979. The fact that Berens asked for and received copies of the contract and the proposals at the July 26 meeting is further evidence that he was unaware of the situation. Second, despite the testimony as to Berens' lengthy and laborious note taking described at length by Buskohl and Frank, Berens' notes for July 26 are sketchy and abbreviated, running only a page and a half, and giving the merest outline of what transpired at the meeting as described by Buskohl and Frank. And, third, I have already noted my doubts on Berens' credibility based on the July 19 mailgram. A tendency for self-justification, beginning with the July 19 mailgram, runs through all of the correspondence addressed by Berens to Frank throughout this period, along with a lot of preaching and subtle and not so subtle insults.[18]

Thus, I credit the version of the July 26 offer given by Buskohl and Frank, and I do not credit Berens' denial.

At the next meeting Berens rejected the Union's wage proposal. Apparently, nothing further was said about the 48 percent, but it is clear from Buskohl's testimony that the Company's position was outright rejection of any increase in wages. There was considerable discussion on other items, with some agreements reached.

The next meeting took place on August 7. Berens began by discussing the settlement agreement in Case 18–CA–6328. Berens talked about work rules and picketing problems under South Dakota laws. He then announced a new proposal on wages. The Company would change the commission system to a system where there would be four categories of mechanics. Category A would receive $8 per hour, category B, $7, and two other categories were at lower rates. Of the present mechanics only Buskohl and Jens Larson would be paid at the A rate, the others in lower categories. As justification for this proposal Berens stated that the Company had to be competitive with other dealers in the area.

According to Berens' notes for August 7 his proposal was for a "flat hourly rate" with four categories, A to be paid $8; B, $6.75; C, $5.50; and D, $4.50. However, it appears from the evidence that he gave no explanation of what he meant. There is in this trade a considerable difference between a "flat hourly rate," and an "hourly rate" based on clock hours. In the former, employees are paid the assigned rate, but the hours they are paid for are computed on the "books" just as under the commission system described above. Under the clock hour system, employees would be paid the assigned rate only for hours actually worked.

Since there had been no explanation of this proposal the employees believed that Berens was proposing a clock hour system. Under this Buskohl, as an A category mechanic, would receive $320 for a 40-hour week, whereas under the previous system he had averaged $510 for the same 40 hours. Others who were to be placed in lower categories would lose even more. The proposal left the employees in a state of shock. Frank stated that the employees were not interested in an hourly scale, and the meeting adjourned until August 14.[19]

The parties next met on August 20.[20] There was some more talk about the legality of the Union's picket line,

[18] I would be remiss if I did not note that Frank suffered from the same tendencies.

[19] See discussion above on that meeting.

[20] At this meeting, for the first time, Berens' notes show an attempt to capture the words of the parties almost verbatim.

and Berens again advised the Union of the Company's desire to implement a new set of work rules. Berens then presented what he described as the Company's "final offer." He indicated that the Company would be willing to negotiate at any time in the future but, if the Union did not accept the proposal, in its entirety, by August 29, the Company intended to implement the proposal on September 1.

The offer with regard to wages was described in Berens' notes as follows: "proposes a 4 classification mechanic system w/ an hourly rate as follows," then listing four categories; A at $8.50; B at $7.50; C at $6.25; and D at $4.50. Buskohl and Larson were to be A mechanics, the rest, B. Body shop rates for all employees would be $8. The proposal called for increases in the second and third years.

At this point the Union caucused and came out with some revisions of its proposals. All of these were rejected where they did not agree with Berens' "final offer." Berens then asked Frank if he had any further changes to make, or if he intended to make any. Frank replied no in each case. Berens went on to state that he felt they were at impasse, adding that if Frank had anything "meaningful" to discuss, to contact him.

At this time, the employees still thought Berens was proposing a clock hour system. Berens certainly did or said nothing to disabuse them of this. His own notes, as quoted above, refer to the new system as "hourly rate" without the qualifying word "flat" which means something quite different. Berens must have known of the employees' concern with this aspect of his proposal, and in those circumstances he seemed willing, even anxious, to declare matters at impasse.

On August 25 Frank wrote to Berens stating that the Union did not agree that an impasse existed and requesting a meeting. Another session was set up for September 6. However, Berens could not make it and he sent his associate, Terry Schraeder, in his place. After some discussion, the employees put the question directly to Schraeder as to whether the proposal was for clock hours or flat rate hours. Schraeder did not know the answer but promised to check with the Company and give them an answer. He did check and returned to tell the employees that the Company's proposal was to pay a flat hourly rate based on the Oldsmobile factory book. Schraeder was unable to explain what would happen when work involved cars which were out of warranty or which were not sold by the Company.

This statement, whether it was a classification or a change in position, made a considerable difference. In Buskohl's case, he had been working at a commission rate of $8.55 (47.5 2 percent of $18) on the hours prescribed by the book. The difference in book hours between the factory book and the other books would make a difference, so Buskohl's loss under the Company's proposal as it stood on September 6 was 5 cents an hour for every hour worked added to the loss of hours through use of the factory book.[21] The loss of the other commission mechanics relegated to the B category would be $1.05 an hour plus the hours as noted above. The September 6 meeting produced no further results. Schraeder made no movement in any area although the Union made two slight concessions. Another meeting was set for September 14.

Berens returned on September 14 and the Union's attorney, Harry Smith, was present. There is no evidence that Smith said or did anything at this meeting. Berens began this meeting with a request to tape-record the session, which was rejected, and with a request for a copy of a contract between the Union and an International Harvester plant in Sioux Falls, which Frank also refused. At one point in this meeting Berens offered to sign the same contract that the Union had with International Harvester, and at another point said he would pay the average of the wages paid to other mechanics in Sioux Falls. Both of these proposals were refused. Several smaller items were settled at this meeting and it was tentatively agreed to meet again on September 28.

There were some additional agreements made at the September 28 meeting, but no progress was made on the wage issue. Berens again raised the International Harvester question and Frank told him that it was not the same type of contract, wages were lower but fringes were higher. Berens again pointed out that the Company could not stay competitive with the commission system, but he would not answer a question as to how it could stay competitive all these years, and suddenly it was no longer competitive, and he declined to bring in company records. The meeting broke up after some more agreements had been reached.

The next meeting was held on October 19 with a Federal mediator present. At this point the parties had agreed on a number of items leaving only the questions wage issues, holidays, and the length of the contract. However, no additional progress was made and no further meetings were scheduled.

On October 29, Berens wrote a letter to Frank which, while it purports to be a summary of the positions of the parties, added an additional clarification on the wage issue, pointing out that the Company would use factory books as it had previously, to cars in warranty, and would use other books as applicable for other cars.

A meeting was held between the parties on March 13, 1980, but, again nothing was accomplished. At the hearing on May 13, 1980, Berens testified that agreement had been reached and a contract signed by both parties.[22]

D. *Analysis and Conclusions*

1. Respondent's feelings toward the Union

From the outset the record is clear that David Billion, and to a lesser extent his father, Henry, bore a passionate and active dislike of Stan Frank. From my observations of Frank as he testified at this hearing, and from testimony by others about him, I can understand to some extent

[21] I note also that under this system employees would no longer receive an automatic increase whenever the Company increased its charge to its customers.

[22] The terms of this agreement are not in evidence. However, in a letter from Frank to Berens dated March 27, 1980, Frank stated that the employees had accepted the last Company offer as outlined in Berens' letter of March 29, 1980.

the nature if not the level of these feelings. But it appears to me in reviewing the testimony of Frager and Buskohl that David Billion's feelings were directed not only at Stan Frank, but also at the Union itself. Thus, Frager quoted Billion at the June 5 meeting as saying, after talking about Frank, that he did not want anything to do with organized labor because of what he went through at the other dealership. When an employee asked whether they could bring in another union representative to replace Frank, Billion replied that no matter who they brought in it would be the same.

Both Buskohl and Frager testified further as to Billion's feelings. At the meeting on June 5 Billion moved beyond his denunciations of Frank and organized labor to suggest that they "settle things among themselves" and that they did not need "outside involvement." Similarly, Buskohl quoted Billion, at the meeting of June 6, as saying that he did not know why the employees had to pay union dues, and that they could draw up an employee handbook which would be just as good as a union contract.

It is thus clear that right at the beginning Respondent harbored feelings of hostility toward the Union, as well as toward Frank, and, by David Billion's suggestions to the employees that they cease paying dues, abandon the Union and bargain directly with him on June 5 and 6, Respondent has violated Section 8(a)(1) of the Act.

2. The individual bargaining

On July 3, as I have found, David Billion mentioned to Buskohl that he was thinking about giving a raise to the hourly paid employees. Later that day Billion called Frager in to his office and told Frager that the hourly paid employees deserved a raise. He denied that he was bargaining with Frager, but went on to say that, if it was all right with Stan Frank, he would raise Frager's wages by 60 cents (from $4.40 to $5 per hour). Billion then said that if Frank really cared about Frager he would not object and that if Frank did object it would show what he cared about the employees. If they did not get the raise it would be the fault of the Union because ultimately the Union would decide whether or not they got the raise.

This I find to be individual bargaining without notice to the Union[23] in violation of Section 8(a)(1) and (5) of the Act. *N.L.R.B.* v. *Benne Katz d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). I find also that Billion's remarks about the Union's responsibility and Frank's indifference to the welfare of the employees constitute an additional violation of Section 8(a)(1).

On July 13 David Billion had a similar conversation with Mike Wenzel. I find that, here also, Respondent violated Section 8(a)(1) and (5) by individually bargaining with Wenzel. In addition, I find a violation of Section 8(a)(1) in Billion's suggestion to Mike Wenzel at the July 13 meeting that they could get along better without Frank and if David could just talk to the "guys in the shop."

There is no evidence that the proposed wage increases to Wenzel and Frager were ever put into effect. Thus, there could be no recision of those increases, and no violation in that regard.

3. The settlement agreement

On August 20, the Regional Director for Region 18 approved an informal settlement agreement in Case 18-CA-6328.[24] Shortly thereafter, the date does not appear in the record, Respondent sent letters to all of the strikers enclosing a copy of the settlement agreement, and offering full and unconditional reinstatement to their former positions. The letter required the strikers to contact certain company officials within 3 days of the receipt of the letter, indicating that if they did not wish to accept the offer the Company would continue to respect each one's "rights as an economic striker."

The General Counsel alleges that this letter constitutes a threat permanently to replace the employees who were engaged in an unfair labor practice strike. I do not agree. The letter contains no threat to replace those who did not accept the offer, and I find no violation here.

Respondent, on the other hand, argues that, even if the strike at its inception were an unfair labor practice strike, it was converted to an economic strike by the execution of the settlement agreement and that the strikers then became economic strikers subject to permanent replacement. In view of my further findings in this case, I do not feel it necessary to consider this argument.

4. The bargaining unit

The complaint alleges that the following is an appropriate unit for bargaining within the meaning of Section 9(b) of the Act:

> All service and body shop employees employed by the Respondent at its Sioux Falls, South Dakota facility; excluding office workers, shop superintendents, executive or supervisory managers, parts department employees, janitors, watchmen, guards and supervisors as defined in the Act.

This allegation was denied by Respondent in its answer. Respondent did not, in any event, introduce any evidence on the unit.

Buskohl testified that the unit consisted of seven mechanics, of whom five were on commission and two were salaried, and eight bodymen, of whom three were hourly paid. The collective-bargaining agreement defined the unit covered as "all employees" excluding: "office workers, salesmen, shop superintendents, executive or supervisory managers, parts department employees, janitors, watchmen or men who have the authority to hire or discharge." The seniority lists appended to this contract show that the numbers are close to what Buskohl stated. There was no evidence that the constitution of the unit had changed at any time, either before or after the strike.

[23] I do not consider Billion's conversation with Buskohl to be notice to the Union. Buskohl was the shop steward, but Billion was aware that his obligation was to Frank.

[24] The agreement contained a standard nonadmission of liability by Respondent.

Because of these reasons, I find that the General Counsel has shown by a preponderance of the credible evidence that the unit, as alleged in the complaint, is an appropriate unit within the meaning of Section 9(b) of the Act.

5. Dues deductions

The parties stipulated that union dues were deducted from employees' paychecks during the month of June, but were not forwarded to the Union by Respondent until sometime in July. It was further stipulated that this was known to employees during this period.

Section 10 of the contract contains the agreement of the Respondent to deduct and pay over the current union dues and membership fees. Unlike other provisions, this one is limited to "the duration of the contract." In the absence of evidence, and there is none, to show that the failure to transmit the dues for 1 month was done to interfere with the rights of employees, I find no violation of Section 8(a)(1) and (5) in this failure. *Industrial Union of Marine and Shipbuilding Workers of America [Bethlehem Steel Co.]* v. *N.L.R.B.*, 320 F.2d 615 (3d Cir. 1963); *Heart of America Meat Dealers Association*, 168 NLRB 834 (1967).

6. The refusal to bargain

From the beginning it was evident that Respondent was preparing for a long struggle. David Billion's comments to Frager and Mike Wenzel show that he knew that negotiations were going to be extended, as they were. I cannot, on the other hand, place the blame for the delay in beginning negotiations on Respondent. David Billion told the employee bargainimg committee on June 5 that he would not be doing the negotiating, and on June 6 he furnished Buskohl with Berens' address and telephone number. This information was duly passed on to Frank. But Frank did nothing. Through stubbornness, or a misplaced conception of labor relations etiquette, Frank allowed the situation to smolder until the end of July.

When the negotiations began on July 26 it was apparent that Berens was completely unprepared. I have found that he had only limited contact with David Billion before this time,[25] and that Berens' notes, particularly for the first two meetings, are unreliable because they do not conform with the extended and labored notes described by Buskohl and Frank and evident in the notes from August 20 on. Thus, when Berens made the offer of 48 percent on the commission rate on July 26 he apparently was acting on his own initiative. He was quickly brought around, and the 48-percent figure was withdrawn on August 1.

Beyond the retraction of the 48-percent offer, the key to the question of whether Respondent was bargaining in good faith or was engaging in unlawful surface bargaining is in the wage proposal which Berens made at the August 7 meeting.

In these days it is unfortunately very clear that economic or competitive conditions make it necessary for employers to attempt reductions in the level of wages and other benefits paid to employees. In this case Respondent had, according to David Billion's testimony, taken a survey of other dealers in Sioux Falls and found that those dealers paid on the flat hourly rate system, and that the rates paid were less than Respondent was paying. This furnished the basis for the offer made on August 7, according to Billion and Berens.

As it developed in the record of this case, the offer made on August 7, and improved on August 20, was not a flat hourly rate system, or at least was not explained as such by Berens. The employees were left with the impression, at least up to September 6, that the proposal was a clock hourly rate. Either intentionally or unintentionally Berens left them with that impression. Then, on September 6, Schraeder, who was unfamiliar with the negotiations, admitted after consultation with Berens, or someone at the Company that the offer was indeed for the flat hourly rate, but based on the factory book. To the employees the first proposal seemed catastrophic, with the B mechanics having their wages cut almost in half. The second offer, or clarification, was not as serious a financial blow, but was still substantial, particularly, as I have noted, for the bulk of the work force, the B mechanics. The final clarification, or revision, of the wage proposal was not forthcoming until October 29 in Berens' letter to Frank finally stating that factory books and other applicable books would be used to compute the flat rate hours.

It seems elementary to me that if one party to a collective-bargaining agreement is proposing to the other a fundamental change in a critical area such as wages, the party proposing the change has a duty both to state clearly and with adequate documentation the reason and rationale for the change, and to explain in detail what the change is and how it is expected to affect the other party. Here, even according to his own notes, Berens announced the change in the Company's wage structure, as the first item in a catalog of further points, without explanation, justification, or even comment other than to mention something about being competitive with other dealers. He concluded his presentation, according to his notes, by asking, "Do you have a counter." If this was intentional it shows me a complete lack of good faith, if unintentional it shows an astonishing naivete and lack of experience. In the latter case such a reckless lack of concern for the bargaining process is the equivalent of bad faith.

There was some attempt later to rationalize the proposal by Berens, but this was not until September 14, when he spoke about getting figures from other dealers, but in the context of offering "an average" of what the other dealers were paying.[26]

I consider this "offer" to pay an average of other local dealers rates to be a sham. Any average would be lower than the highest and the evidence in this case is clear

[25] David had been on vacation in Minnesota since around July 14.

[26] David Billion testified at the hearing about figures he had compiled at some time in 1979 from other dealers in Sioux Falls. The General Counsel objected to this testimony as hearsay, and I suggested to counsel for Respondent that he would have to bring those dealers in to testify if he wanted to get that evidence in the record. This was not done, so we have no rationale for Respondent's wage proposals in the record beyond Billion's unsupported and undocumented assertions.

that Respondent, as the only unionized shop in Sioux Falls, paid the highest rates in the area. Thus, any "average" would involve a reduction for Respondent's employees. I consider this further evidence of bad faith on the part of Respondent. Similarly, I consider the demand by Berens for a copy of the contract between the Union and International Harvester, and the intimations that Berens would offer those terms to Respondent's employees, a frivolous diversion. Certainly the fringe benefits may be higher, but if the wage rates quoted in Beren's notes for September 14 are accurate, the loss in wages for Respondent's employees would more than offset any gain in fringe benefits.

These diversions,[27] when regarded together with the size of the wage cut proposed on August 7, the paucity of explanation given either to the Union at the bargaining table, or at this hearing, indicate to me that the August 7 wage proposal was not a legitimate reflection of Respondent's economic or competitive problems, but rather an attempt to freeze the bargaining process into immobility, which is just what it did.

When this wage proposal is viewed, in consideration of the totality of Respondent's conduct here: the statements by David Billion in June that negotiations would be long and drawn out; the attacks on Stan Frank and organized labor; the suggestions that matters could be worked out without the Union; the individual bargaining with employees; the withdrawal of the wage increase; the announcement by Berens on August 20, at the fourth bargaining session, of his "final" offer,[28] and, on its rejection, of an impasse, before the wage offer had been explained or classified in its final form;[29] Berens' failure to attend the meeting set up for August 14; Respondent's insistence on using the factory book only when it was finally made clear on September 6 that the wage proposal was for a flat hourly rate, rather than clock hours; and the unyielding rigidity of all of Respondent's proposals; I cannot escape the conclusion that this conduct shows a planned, calculated strategy to frustrate and ultimately to nullify the bargaining process.

In consideration of all of the above factors I find that Respondent has not bargained in good faith in violation of Section 8(a)(1) and (5) of the Act. *N.L.R.B.* v. *Herman Sausage Co., Inc.*, 275 F.2d 229 (5th Cir. 1960); *N.L.R.B.* v. *Insurance Agents' International Union, AFL–CIO* [*Prudential Insurance Company of America*], 361 U.S. 477 (1960); *Tomco Communications, Inc.*, 220 NLRB 636 (1975).

7. The nature of the strike

The evidence is clear that the individual bargaining by Respondent with Frager and Mike Wenzel was a contributing factor to the decision made by the employees on July 18 to vote to strike, and on July 25 actually to begin the strike.[30] Therefore, I find that the strike from its inception was an unfair labor practice strike. The fact that Respondent entered into a settlement agreement did not serve to convert the strike to an economic strike since, as I have found, at the same time that it entered into the agreement, Respondent was engaged in additional unfair labor practices at least as serious as those covered by the Agreement. Therefore, I find that the strike began and continued as an unfair labor practice strike.

IV. THE REMEDY

Having found that Respondent herein has committed certain unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent bargain in good faith with the Union, and that it offer full reinstatement to its employees who began a strike on July 25, 1979, to their former or substantially equivalent positions from the date of their unconditional offer to return to work, discharging, in the process, any replacements for those strikers; and I shall recommend that Respondent be required to post the customary notices advising its employees of their rights and of the results of this case.

CONCLUSIONS OF LAW

1. Respondent, Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local No. 687, Allied Industrial Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All service and body shop employees employed by Respondent at its Sioux Falls, South Dakota facility; excluding office workers, shop superintendents, executive or supervisory managers, parts department employees, janitors, watchmen, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times material herein Local No. 687 has been the exclusive collective-bargaining representative of the employees in the unit here found appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By individually bargaining with employees Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By denigrating the Union and its representatives and by attempting to solicit its employees to withdraw from the Union, Respondent has violated Section 8(a)(1) of the Act.

7. By refusing to bargain collectively in good faith from and after July 26, 1979, Respondent has violated Section 8(a)(1) and (5) of the Act.

8. The strike which began on July 25, 1979, was an unfair labor practice strike.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to

[27] I view Berens' introduction of work rules into the negotiations, where there had been no problems or complaints concerning work rules to be a similar diversion, both irrelevant and disruptive to the process.

[28] Berens stated at that time that the proposals would be implemented as of September 1, 1979, but there is no evidence in the record that this was done.

[29] *The Andrew Jergens Company*, 76 NLRB 363 (1948); *Metlox Manufacturing Company*, 225 NLRB 1317 (1976).

[30] *C & E Stores*, 221 NLRB 1321 (1976).

Section 10(c) of the Act, I make the following recommended:

ORDER[31]

The Respondent, Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Individually bargaining with its employees.

(b) Demeaning and insulting the Union and its representatives.

(c) Attempting to persuade its employees to abandon the Union.

(d) Refusing to bargain in good faith with the Union as the representative of employees in the unit found appropriate in Conclusion of Law 3, above.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the representative of employees in the unit found appropriate in Conclusion of Law 3, above.

(b) Offer to each of the employees who began a strike on July 25, 1979, immediate and full reinstatement to the jobs they held immediately before July 25, 1979, or if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired in their places.

(c) Make the striking employees whole for any loss of earnings they may have suffered by reason of the discrimination against them by paying them backpay from and after the date when they unconditionally offered to return to work computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[32]

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Sioux Falls, South Dakota, location copies of the attached notice marked "Appendix."[33] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[31] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[33] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."